IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1534

SALLY WILLIAMS,

Petitioner,

vs.

BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Counter-Statement of Questions Involved

1. Should a writ of certiorari be granted where it appears that the action of a state agency in upholding the dismissal of a teacher and the affirmance of that decision by a state court was substantially grounded in matters as to which there is no claim of a denial of a federal constitutional right?

2. Did the state appellate court err in sustaining the admission of hearsay testimony where the declarants were not made available for cross-examination by mutual agreement of the parties?

Counter-Statement of the Case

By resolution dated September 1, 1971, the Board of Education of Union Township, pursuant to N.J.S.A. 18A: 6-10 *et seq.*, certified to the New Jersey Commissioner of Education twelve charges against petitioner, Sally Williams, a tenured teacher of mentally retarded children, indicating that such charges, if proven, would warrant her dismissal. On December 21, 1971, the Board certified to the Commissioner two supplemental charges of insubordination against her.

After a hearing, the Commissioner found the evidence supported eight of the charges* and concluded these sufficiently serious to warrant her dismissal. Under Charge 6, petitioner was charged with insubordination toward her supervisor in that she entered his office, interrupting a phone conversation, threatening him and making loud and disparaging remarks. On a second occasion, she refused to meet with parents in her supervisor's presence, giving rise to Charge 7, also insubordination. Charge 10 was based on petitioner's suggestion to a student who arrived late to school, that she should have stayed home. It was heard and testified to by a social worker who had accompanied the child that morning. Charges 4 and 11 charged her with leaving the classroom unattended on two separate occasions. These five charges have not been challenged on appeal.

* Four of the original charges and both supplemental charges were dismissed.

The remaining three charges sustained by the Commissioner were established primarily by hearsay evidence since the complainants were handicapped children, classified as trainable mental retardates pursuant to N.J.S.A. 18A:46-9*, whose absence was consented to in advance by agreement of the parties. These three charges, two of corporal punishment and one of intimidation related thereto, were proved by testimony of parents and other teachers who had observed the bruises of one child allegedly stricken and to whom this child and others had communicated their recollection of the events giving rise to the charges. The Commissioner was persuaded by the demeaner of the witnesses and testimony establishing the reliability of the hearsay that these charges were made out.

By his opinion dated October 10, 1973, the Commissioner found these instances of insubordination and unprofessional conduct had the cumulative effect of demonstrating her unfitness to continue in the position she had held, and ordered her dismissal. Following this determination, an appeal was filed with the State Board of Education which on February 6, 1974 affirmed the Commissioner's decision dismissing petitioner.

An appeal was then taken to the Superior Court of New Jersey, Appellate Division, which affirmed the State Board

* N.J.S.A. 18A:46-9 defines as "trainable":

> "[children] so severely retarded that they cannot be classified as educable but are, notwithstanding, potentially capable of self help, of communicating satisfactorily, of participating in groups, of directing their behavior so as not to be dangerous to themselves or others and of acheiving with training some degree of personal independence and social and economic usefulness within sheltered environments."

decision in an opinion rendered on January 15, 1975.* The court concluded that the record supported the Commissioner's findings and his conclusion based thereon that petitioner had exhibited a pattern of unprofessional conduct unbecoming a teacher and warranting dismissal. The court held the proofs sufficient to justify the Commissioner's decision without regard to the three charges supported by challenged evidence. Each of the five charges unaffected by the appeal was established by substantial credible evidence. The insubordination charges (6 and 7) were established by testimony of the Director of Student Personnel Services, witness to both instances of misconduct. And with respect to Charges 4 and 11, the Director testified that teachers were never permitted to leave their classes unsupervised, and that this rule was particularly important in the case of handicapped children. Indeed the petitioner's testimony indicated her awareness that she had violated that rule (Pa41). Hence, these sufficed to exhibit the cumulative instances of unfavorable conduct warranting dismissal. *Redcay* v. *State Bd. of Ed.*, 130 N. J. L. 369, 371 (Sup. Ct. 1943), aff'd 131 N. J. L. 326 (E. & A. 1944). With respect to the three disputed charges, the court considered the hearsay statements relied upon by the Commissioner and in each in-

* Petitioner has not named the State Board of Education as a respondent herein. It is assumed that this omission was inadvertent since the State Board was a party to the proceedings in the State Court and the Attorney General of New Jersey, as counsel to the State Board, has been properly served. It is New Jersey law that where an appeal is taken from the quasi-judicial decision of a state administrative agency, that agency is a party to the appeal. Pressler, *Current N. J. Court Rules*, R. 2:5-1(e). Rule 21(4) requires that all parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court.

stance found them admissible. Statements made by the child stricken to his mother and statements made by students who had witnessed the incident to other teachers were held admissible under the *res gestae* exception to the hearsay rule as they were made within a reasonable proximity to the event described and without opportunity to fabricate. In support of this, testimony was offered by the Board that "trainable" children lack the mental capacity either to fabricate an untruth or to conspire to tell the same untruth. No evidence refuting this position was presented on behalf of petitioner. Testimony of the two teachers who observed the bruises of one child shortly after the injury was held admissible as circumstantial evidence relevant to the charge and based on the personal knowledge of the witnesses. And the statements made by several children in the school bus to the mother of the injured child identifying petitioner as the assailant were admissible as corroborative of other competent proof, for which purpose hearsay inadmissible in a judicial proceeding may be received in the administrative context. *State* v. *Weston*, 60 N. J. 36, 51 (1952); N.J.S.A. 52:14B-10.

On March 11, 1975, the Supreme Court of New Jersey denied petitioner's petition for certification. Mrs. Williams filed her petition for a writ of certiorari on June 6, 1975.

ARGUMENT

The Court should not grant a writ of certiorari because the state court's decision was substantially grounded in matters as to which no federal constitutional claim is advanced.

It is well established that the Court only has jurisdiction to review the judgment of a state court where the record shows that a federal question was raised, and that it was decided adversely to the petitioner. The record must also show that the federal question was necessarily involved in the decision, and that the state court could not have rendered its judgment without deciding it. If that judgment can be sustained on other than federal grounds, the court will not revise it even though a federal question may also have been decided, and even though that question may have been decided incorrectly. *Williams* v. *Kaiser,* 323 U. S. 471, 477-78 (1945); *Smith* v. *Adsit,* 83 U. S. 185, 189 (1873).

In the instant case, fourteen charges against petitioner were certified to the Commissioner by the local school board, pursuant to N.J.S.A. 18A:6-10, which lists as grounds for proper dismissal of a tenured teacher inefficiency, incapacity, unbecoming conduct or other just cause. The Commissioner concluded that six of the fourteen charges should be dismissed. He sustained the remaining eight. Of these, five were established by the testimony of witnesses to the instances of alleged misconduct. Three were supported by testimony of parents and teachers which included statements made to them by the children in petitioner's class but not present at the hearing. It is these charges that were challenged on appeal as improper because based on incompetent evidence and as to which petitioner herein urges denial of her right to confront her accusers.

New Jersey case law clearly recognizes the confrontation interest in the disciplinary context for school children. *Tibbs* v. *Board of Education of Franklin Tp.,* 59 N. J. 506 (1971), aff'g 114 N. J. Super. 287 (App. Div. 1971). It is reasonable to assume that in a proper case New Jersey courts will recognize that interest in the tenured teacher dismissal context as well, since New Jersey has been a leader in State fashioned procedural rights. See, *e.g., Donaldson* v. *No. Wildwood Bd. of Ed.,* 65 N. J. 236 (1974) (statement of reasons for nonrenewal of nontenured teachers' contracts). But confrontation requires a demand that the witnesses be present. Here contrary to a demand to confront there was a waiver. Prior to the hearing, the parties agreed not to call these children for testimony, both because all concerned desired to spare them the emotional trauma of an adversarial proceeding and because their legal competency as witnesses was questionable. Petitioner, in so agreeing, conceded below that without their testimony the proofs introduced to sustain the charges would include hearsay evidence (Pa14). Having participated in this decision to exclude their testimony, she cannot now rely on the right to demand the presence of "accusing" witnesses accorded by State law in *Tibbs* v. *Board of Education of Franklin Tp., supra. Cf. Schneckloth* v. *Bustamonte,* 412 U. S. 218 (1973). Nor does the hearsay nature of the testimony alter this conclusion since, as correctly discerned by the Appellate Division, for the most part this hearsay was admissible within the *res gestae* exception to hearsay rule. N. J. Evid. R. 63(4). In fact, the testimony of the teachers who personally observed the bruises of a stricken child is not hearsay at all. And the testimony of the children on the school bus only added to a residuum of competent testimony and so was clearly permissible under State law relating to administrative hearings. *State* v. *Weston,* 60

N. J. *supra* at 51; N.J.S.A. 52:14B-10. *Cf. Dutton* v. *Evans*, 400 U. S. 74 (1970).

Beyond the confrontation-hearsay issues, and dispositive of this petition, is the fact that the Commissioner's decision to dismiss the petitioner was found by the Appellate Division to be independently justified on the basis of the undisputed charges (Pa4). Five of the eight charges sustained were unaffected by the challenged evidence. They included two separate acts of insubordination and unauthorized absences from the classroom on two occasions for the duration of which a class of mentally retarded children was left unsupervised, exposed to harm by their own acts and the acts of each other. The fifth, witnessed and reported by a social worker, was based on petitioner's greeting a late student, upon her arrival, with "why couldn't you have stayed home today?" Petitioner's testimony that instead she had composed a rhyme about the late arrival, which she recited, revealed equally unprofessional conduct in the use of public sarcasm to no educational purpose, designed solely to embarrass and intimidate the child publicly.

These five charges alone manifested recurrent instances of professionally irresponsible behavior justifying the Commissioner's decision to dismiss. The requisite pattern of misconduct is established. The charges relating to physical abuse only embellished an already substantial record.

Absent any clear showing that the State Appellate Court relied only or primarily on federal grounds, and confronted with apparent relinquishment of the right now asserted, it is respectfully submitted that this case does not provide an appropriate context in which to consider the federal constitutional questions which petitioner has attempted to project for the Court's discretionary review.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that Williams' petition for a writ of certiorari should be denied.

Respectfully submitted,

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